

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON

	X	
	:	
IN RE:	:	MDL NO.
ETHICON, INC.,	:	2:12-MD-02327
PELVIC REPAIR SYSTEM PRODUCTS	:	
LIABILITY LITIGATION	:	

THIS DOCUMENT RELATES TO ALL CASES :

TELEPHONIC STATUS CONFERENCE  
BEFORE THE HONORABLE CHERYL A. EIFERT,  
UNITED STATES MAGISTRATE JUDGE  
WEDNESDAY, JULY 2, 2014

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1                   P R O C E E D I N G S

2                   Had before The Honorable Cheryl A. Eifert, United  
3                   States Magistrate Judge, United States District Court, for  
4                   the Southern District of West Virginia, at Huntington, via  
5                   teleconference, on July 2, 2014, as follows:

6                   COURTROOM DEPUTY CLERK: Good morning.

7                   MR. GAGE: Hello.

8                   COURTROOM DEPUTY CLERK: Good morning. This is  
9                   Laura. How is everyone today?

10                  MR. GAGE: Hey, Laura. It's William Gage and Ben  
11                  Watson. How are you?

12                  COURTROOM DEPUTY CLERK: I'm doing well, thank  
13                  you. So I have the court reporter here. This will be on  
14                  the record. And if you all don't mind to just start with  
15                  plaintiffs' counsel and just let me know who's on the line.

16                  MS. BAGGETT: Renee Baggett.

17                  COURTROOM DEPUTY CLERK: Thank you.

18                  MR. CARTMELL: Tom Cartmell.

19                  COURTROOM DEPUTY CLERK: Tom Cartmell, yes. Next?

20                  MR. FAES: Andrew Faes, F-A-E-S.

21                  COURTROOM DEPUTY CLERK: Thank you.

22                  MR. ZONIES: Joe Zonies, Z-O-N-I-E-S.

23                  COURTROOM DEPUTY CLERK: I'm sorry, I did not get  
24                  your first name?

25                  MR. ZONIES: Joe, J-O-E.

1 COURTROOM DEPUTY CLERK: All right. Thank you.

2 For defense counsel, please?

3 MR. GAGE: William Gage and Ben Watson.

4 COURTROOM DEPUTY CLERK: All right. Anyone else?

5 MS. JACOBS: Donna Jacobs.

6 COURTROOM DEPUTY CLERK: Thank you.

7 MR. GAGE: And, Laura, I know that Rich Bernardo  
8 is joining the call.

9 COURTROOM DEPUTY CLERK: All right. Thank you.  
10 It looks like we've got another minute.

11 MR. BERNARDO: How's it going, William?

12 MR. GAGE: Good. Who is that?

13 COURTROOM DEPUTY CLERK: Is that Mr. Bernardo that  
14 just rang in?

15 MR. BERNARDO: Yes, it is. Good morning.

16 COURTROOM DEPUTY CLERK: Good morning. Is that  
17 everyone as far as we know?

18 UNIDENTIFIED SPEAKER: I think that Mr. Aylstock  
19 is --

20 COURTROOM DEPUTY CLERK: I'm sorry, I didn't get  
21 that.

22 MR. AYLSTOCK: I'm on. Bryan Aylstock.

23 UNIDENTIFIED SPEAKER: Yes, that's what I was  
24 going to say, that's Bryan. I thought he was joining.

25 COURTROOM DEPUTY CLERK: All right. If everyone

1 will hold one moment, I will get the Judge.

2 THE COURT: Morning.

3 (Good morning, Your Honor.)

4 THE COURT: All right, I think I know who all is  
5 on the phone. So tell me what's going on.

6 MR. BERNARDO: Good morning, Your Honor. This is  
7 Rich Bernardo on behalf of Ethicon. And thank you for  
8 joining us. The subject of this call are several 30(b)(6)  
9 notices that plaintiffs served going back about a month or  
10 so ago. Two of them have -- (recording inaudible  
11 interruption) -- are ripe for guidance from Your Honor, but  
12 let me just describe the total package of them so you'll  
13 have a little context.

14 So there are five total notices. Three of them  
15 essentially seek payments or information about payments or  
16 contracts regarding a number of individuals, researchers,  
17 authors, et cetera, and a number of entities. A fourth one  
18 seeks information regarding Ethicon's professional education  
19 and training. And that's a notice that had been served  
20 earlier but had been -- (recording inaudible) -- in  
21 connection with these other two notices.

22 And then the last one seeks information about Ethicon,  
23 L.L.C., an entity that I understand was recently dismissed.

24 So those are the five notices by way of context.

25 Now, Ethicon has been meeting and conferring with

1 plaintiffs in an effort to try and narrow the areas of  
2 dispute. And we think we've completed our meet-and-confer  
3 process with respect to two of the notices and, as I  
4 mentioned, we have a couple of issues. The other three we  
5 have some agreements, but we're still in the process of  
6 meeting and conferring to address any outstanding areas of  
7 dispute, and due, I'll say, to no fault of either party, I  
8 think, but it's been challenging trying to make sure the  
9 right people are together to make sure we can penetrate  
10 those and hopefully come to some agreement. But if we don't  
11 come to agreement, we were hoping that we might be able to  
12 come back to Your Honor on any narrow areas of dispute on  
13 those later next week, being mindful of the fact that you're  
14 going to be away. So if we have areas of dispute on those,  
15 we were hoping we might visit with you again next Thursday,  
16 if that's agreeable to you.

17 So, the two notices, the two notices at issue, one  
18 notice pertains to payments made -- essentially payments  
19 made and contracts with certain researchers, a Dr. de Leval  
20 and Dr. Waltregny, going back well over a decade, an  
21 organization called Medi-Line, in connection with some TVT-O  
22 research that took place.

23 The other notice at issue pertains to payments and  
24 contracts with approximately a dozen medical societies and  
25 organizations. And notably notices seek information

1       regarding -- and I'm quoting from some of them -- the  
2       identity and terms and conditions of agreements; the amounts  
3       paid; the services provided.

4               And the two issues we wanted to raise with Your Honor  
5       today are, first, whether in response to these notices,  
6       Ethicon really needs to put up a witness to talk about the  
7       specific amount paid or what the contract says, given the  
8       nature of that subject matter and all that Ethicon has done  
9       and is willing to do to otherwise provide plaintiffs with  
10      meaningful and useable information with respect to those  
11      notices. That's one issue that we want to discuss with Your  
12      Honor.

13             And then the second issue is if Your Honor is of the  
14      view that a witness does need to be tendered to one or both  
15      of those notices, there are a couple of subject matters, and  
16      one, in particular, pertaining to what I would characterize  
17      as foreign regulatory issues that Ethicon objects to on the  
18      grounds of relevance.

19             So as a preliminary matter -- and I think this is  
20      important for context -- I want to make it clear, Your  
21      Honor, that Ethicon objects to these notices really in their  
22      entirety, on the grounds that at some point discovery in  
23      this proceeding has got to come to an end. And we think  
24      that we're at or very near that point. I think you're well  
25      aware there have been over 20 million pages of documents

1 produced. We've been through several trials. And I  
2 understand on different products, but we've tendered dozens  
3 and dozens of company witnesses, many of whom have testified  
4 for several days each.

5 And these notices, they were either served for the  
6 first time or kind of re-served on the eve of the trial for  
7 Huskey, which is, as you know, scheduled to begin next  
8 month. And these requests are becoming more and more  
9 detailed, more and more burdensome. They're asking for  
10 minutia that is extremely difficult and time-consuming for  
11 the company to collect and put together. It's particularly  
12 complicated by the fact that it dates back many, many years.

13 But, despite its objection, rather than coming to you,  
14 Ethicon has agreed to provide the discovery with certain  
15 limitations; it's agreed to go back and undertake a  
16 substantial re-review and collection of documents previously  
17 collected that -- where these payments or the information  
18 about them may not have come through the agreed upon  
19 filtered terms with plaintiffs; it's agreed to go out and  
20 make additional searches for documents that have been  
21 extremely time-consuming just given that this stuff is, I'll  
22 say, it's sort of like a scavenger hunt, going all over  
23 Europe, to try and find it; and it's also agreed to do all  
24 of this on an expedited basis so it could get material to  
25 plaintiffs by the end of this month, which may not sound to



1 Your Honor like expedited, but I will represent that, given  
2 the types of efforts that we're going through to get this  
3 information, I mean, that's been a very, very quick  
4 turnaround. So why are we here if we've agreed to do all of  
5 this?

6 I think the reason we're here is that while we're  
7 agreeable to get by our objections and produce documents,  
8 Your Honor, Ethicon just simply doesn't believe that these  
9 subject matters are appropriate for a deposition, in that  
10 propelling a witness on them to be able to testify about  
11 what the document says with respect to how much was paid to  
12 somebody or what a contract says, and having a witness get  
13 on top of all of that, particularly at this stage of the  
14 litigation and this close to the Huskey trial, is very, very  
15 burdensome, and it's also not the most efficient way of  
16 addressing this.

17 I think history has shown in this case that after  
18 documents are produced, there are a myriad of questions that  
19 arise that many times the plaintiffs raise issues that  
20 require further inquiries. And that can't be addressed by a  
21 witness, you know, on the spot, at a deposition.

22 So we proposed to plaintiffs, look, we'll produce the  
23 documents; we'll work with you to either agree on  
24 stipulations so that we -- we don't need to put a witness in  
25 the chair, which is really what we think should be the

1 appropriate way, but worst case, if there's some narrow,  
2 specific testimony that is needed after the parties work  
3 together reviewing these materials, then we can  
4 meet-and-confer on that.

5 Now, when we related that, plaintiffs said, well,  
6 that's why you have this 10-day buffer period between the  
7 time when you produce the documents and the deposition. But  
8 that's clearly insufficient time to allow plaintiffs to look  
9 at the material, raise issues with us, and have us go back  
10 and deal with them. And I think we're all jammed up against  
11 the Huskey trial, and we're trying to, again, do what we  
12 think is reasonable and propose reasonable alternatives.

13 But, again, we're simply objecting to having to prepare  
14 30(b)(6) witnesses on these subject matters at this stage.  
15 So that's one issue.

16 And then the second issue is -- and I'll topline that  
17 very much, because if the first issue is resolved favorably,  
18 then we may not get to the second. But the second issue is  
19 three specific topics on what I'll call the de Leval notice,  
20 the notice about this researcher. And what plaintiffs  
21 essentially want is discovery about this third-party's  
22 potential regulatory violations a decade ago in connection  
23 with that research.

24 Now, Mr. Gage, who is also on the call, can backfill  
25 with any detail, if Your Honor desires, but essentially, as

1 I understand it, this researcher may not have complied with  
2 full on regulatory rules in connection with that research.  
3 And plaintiffs want Ethicon to put up a witness to testify,  
4 I guess, as to whether or not that conduct violated  
5 regulatory rules in Europe; and, if it did, whether Ethicon  
6 decided to report it or do anything about it.

7 And it's Ethicon's view that that kind of testimony and  
8 that subject matter is clearly not relevant, clearly not  
9 admissible. Given the types of rulings on foreign  
10 regulatory or regulatory matters in the prior trials, it  
11 clearly wouldn't be admissible at trial. And, in any event,  
12 we have agreed, notwithstanding our objection, to look for  
13 documents, if any, pertaining to that. We've not found  
14 anything relevant yet, but we've agreed to produce the  
15 documents and again work with plaintiffs.

16 So to sum up, and then I'll answer any questions or let  
17 plaintiffs speak: We object to putting up a witness with  
18 respect to these two notices. And if we do have to put up a  
19 witness, we object to having the witness have to be prepared  
20 to testify about a matter that is clearly, clearly not  
21 relevant.

22 Thank you, Your Honor.

23 THE COURT: All right. Thank you. Well, let's  
24 hear then from the plaintiff. And we'll start off with the  
25 fact of having to put up 30(b)(6) witnesses.

1 MR. CARTMELL: Good morning, Your Honor, this is  
2 Tom Cartmell. I'll respond to that. Really, we have just a  
3 little bit of background on this. We have been talking  
4 about these notices on multiple meet-and-confer calls for  
5 two or three weeks. And with respect to the society  
6 payments Notice, primarily, we've -- they've told us from  
7 the beginning that they did not want to put somebody up, but  
8 they would rather put -- just give us documents that say,  
9 you know, here's the amount that was paid to AUGS; here's  
10 the amount that was paid to AUA, American Urology  
11 Association, and things like that.

12 And we have had those discussions in the past related  
13 to 30(b)(6) motions. You may remember that, that our  
14 notices -- we had a 30(b)(6) notice related to the amount --  
15 the number of implants in women. And the same argument was  
16 made. I can't -- I did not go back to look at the  
17 transcripts, but I think maybe that was one that was in  
18 front of you previously. And we ended up -- they produced a  
19 witness and we took the deposition with the documents. Of  
20 course, we explored beyond just the actual number, because I  
21 Noticed extra things other than just the number.

22 And in this case, for instance, in our society payment  
23 Notice, we do just -- we do ask for the amounts of payments  
24 to multiple societies. And the societies listed are all the  
25 societies that the defense has referred to in the trials

1 that we've had. Actually we've only had one-half trial in  
2 the MDL, unfortunately. I was the plaintiff's attorney that  
3 was on that case and resulted in a half of a trial.

4 But we did have a state court case, and in that case,  
5 these are the societies -- or the Notice includes the  
6 societies that were referred to routinely by defense counsel  
7 in their defense of the case, saying that, you know, all of  
8 these -- I think it's eight or ten societies -- support that  
9 slings and mesh is safe and effective for women. So we had  
10 intended to do this discovery prior to those trials.

11 In January of this year, in New Jersey, Adam Slater had  
12 served a Notice related to payments to societies. We were  
13 going to trial in Texas, I think in March, and we, frankly,  
14 we talked to Adam about that and were intending to do that  
15 discovery beforehand, or let him do it, because we were just  
16 -- the MDL was tied up with that trial. And so we didn't  
17 get the Notice out until May 23rd of this year. Although,  
18 they have been on notice that -- in New Jersey, that that  
19 was a topic that was going to be asked for.

20 On the issue of whether or not a witness should be put  
21 forward on this, I will tell you, Diane Watkins, a lawyer  
22 from my firm, has done research on that. I suspected there  
23 might be some sort of case law that was out there dealing  
24 with whether or not a defendant can claim that the best form  
25 of discovery would be in the form of, you know, a

1 stipulation, like they've asked us to do, or interrogatory  
2 answers, those sorts of things.

3       There's nothing that we have found dealing with a  
4 stipulation, but there is, there's case law -- lots of case  
5 law, actually, where defendants have made this same sort of  
6 request of a court. They've said, look, it would be more  
7 efficient to do it by an interrogatory answer is typically  
8 the context in the cases. And every single case that we  
9 have found has -- the Court has said that that's not  
10 appropriate; that a 30(b)(6) deposition is different than  
11 the scope of an interrogatory answer. And I would argue  
12 that it's different than a stipulation; that the plaintiffs  
13 can choose the form of discovery that they, they would like.  
14 In some cases, it's an order. They can choose the order, if  
15 they want to do the deposition before the interrogatories.  
16 And that it's -- the scope is greater, because it's intended  
17 to bind with the testimony that can be used at trial, under  
18 oath, and have a witness from the company designated who can  
19 bind the corporation.

20       And the courts realize that, you know, it's not just  
21 asking for one, single response, like a number for payments,  
22 but that we're asking for testimony related to topics. And  
23 our Notice, our society Notice, for instance, and in the  
24 de Leval Notice, as well, we have several topics, including,  
25 you know, the location of the documents related to payments.

1 Because, the Court might remember, when we took in a TVT  
2 case the deposition of a designee, Ms. Angelini, that it  
3 became apparent to us when we got to the deposition that  
4 there were lots of documents that they couldn't find; and  
5 she told us when we got there, that from 2003 prior, they  
6 could not find any -- they were unable to locate, I think is  
7 what she said, any documents related to payments. And the  
8 reason for that was they had to go to different foreign  
9 entities to look. And the foreign entities had not kept any  
10 of that material.

11 So we've asked, of course, in this one, if we can  
12 have -- you know, if that's going to come up, we need to  
13 know and discover where these documents are; what they did  
14 to look for them. And we're asking for more than just a  
15 number. In other words, we're asking for the terms and  
16 conditions of the agreements; we're asking for what types of  
17 activities they've done with these corporations -- or,  
18 excuse me, these societies; we're asking for committees that  
19 they have served on; we're asking for correspondence between  
20 the companies related to the papers on slings and mesh that  
21 they have, that they have between them. And, and --

22 THE COURT: Mr. Cartmell -- Mr. Cartmell --

23 MR. CARTMELL: Yes.

24 THE COURT: I hate to interrupt you, but I don't  
25 want to let you go on too long before I interrupt, because I

1 want to make sure I understand. Because you all know I have  
2 absolutely no paperwork in front of me, so I'm just  
3 listening to you, and trying to figure out what it is that  
4 you've asked for and what it is that Ethicon doesn't want to  
5 do.

6 So --

7 MR. CARTMELL: Okay.

8 THE COURT: So, as I understand it, you have  
9 served them with some 30(b)(6) notices. And at least some  
10 of these notices are asking for contracts and payments  
11 pertaining to various societies, or research entities, or  
12 medical associations, in which Ethicon has some sort of  
13 relationship. And apparently at a trial, Ethicon has said  
14 these various groups or organizations are supportive of the  
15 mesh. And so you want to know what the money exchange is  
16 between the two. Am I following you?

17 MR. CARTMELL: Yes. That's --

18 THE COURT: So we're not talking about  
19 individuals. We're talking about societies or medical  
20 associations or groups of some sort?

21 MR. CARTMELL: Yeah. We're talking about  
22 societies, or medical organizations only, not specific  
23 individuals.

24 THE COURT: All right.

25 MR. GAGE: And, Your Honor, this is William Gage.



1 This is a minor point, but I do think it's important to  
2 clarify so that the record is correct. Mr. Cartmell had  
3 mentioned that in a prior trial the defense had referred to  
4 these societies throughout the trial in support, in support  
5 of the -- (recording inaudible) -- mesh. And Tom is  
6 referring to the Batiste trial, which was in Texas state  
7 court, which Tom and I tried against each other. And I  
8 believe it's a fair statement to say that I tried mightily  
9 to get that information into evidence, but the Court did not  
10 let me put that into evidence, except there was one  
11 particular society that the Court allowed us to put a  
12 statement into evidence because of some relatively minor  
13 issue.

14 But I think the record is clear from that case, that we  
15 did try to put that information into evidence, but the Court  
16 did not allow it. So I just wanted --

17 MR. AYLSTOCK: Judge, this is Bryan Aylstock.  
18 Sorry to interrupt. But we actually filed a Motion in  
19 Limine on these societies and statements of societies in the  
20 Lewis trial and Judge Goodwin denied it. And we do firmly  
21 believe -- and we're not looking to take willy-nilly  
22 discovery -- but this is very likely to be an issue in the,  
23 in the Huskey or Edwards case. It's very likely to be an  
24 issue, and in a lot of MDL cases. And the Notice really  
25 relates to payments and correspondence and agreements

1 between Ethicon and J&J, and these societies, because we  
2 know that Ms. Jones or Mr. Gage is going to come up -- if  
3 they are allowed to by Judge Goodwin or any other judge --  
4 to say, this society, that society, all of these have made  
5 statements in one way or another supportive of mesh. And it  
6 goes directly to the bias on that.

7 Now, the idea that a stipulation would, you know --  
8 they said, well, why don't you just agree to a stipulation?  
9 Well, we need the information, first of all. You can't -- a  
10 stipulation means by agreement. We don't agree.

11 We'd simply like somebody in the chair to help us go  
12 through -- we've got some documents, but they're confusing  
13 and they don't make a lot of sense a lot of times. So  
14 putting someone in a chair on this very issue is going to,  
15 we believe, directly affect the -- one of their main  
16 defenses in this, because they're going to be running up  
17 this society and that society. So it's not -- it's not --  
18 it's borne by what we believe and what we know the defense  
19 is going to use to try to defend themselves in this case.

20 THE COURT: All right. So we have these notices  
21 and they involve payments made by Ethicon or J&J to various  
22 societies and medical associations that have allegedly made  
23 statements supportive of the mesh. And what you want to  
24 know is -- or what you want is to have a 30(b)(6) witness  
25 come and talk about the amount of the payments, any

1 contracts, I guess, that exist. And what else?

2 MR. CARTMELL: There's also, Your Honor, questions  
3 about memberships and positions within these societies. In  
4 other words, they are members of -- Ethicon has members of  
5 these societies, and they have memberships designated. They  
6 pay money for that. They do other things. They provide  
7 goods and services to these societies that we've asked  
8 about. They've also got positions on committees and in  
9 leadership in these societies. In other words, people from  
10 Ethicon who are involved in that.

11 And then we've asked for communication between them, as  
12 well.

13 THE COURT: Okay. And you want to go ahead and --  
14 you don't want to look at the documents first to figure out  
15 whether there really are any questions that you need to ask;  
16 you want to just go ahead with a deposition?

17 UNIDENTIFIED SPEAKER: Well, we --

18 UNIDENTIFIED SPEAKER: Well, we looked at the  
19 documents, Judge. The ones that we could find.

20 THE COURT: Have you received all the documents?

21 UNIDENTIFIED SPEAKER: Judge --

22 UNIDENTIFIED SPEAKER: Not pursuant to the notice,  
23 no. I'm sorry.

24 MR. BERNARDO: Judge, this is Rich Bernardo. Let  
25 me clarify. We've been trying to be as clear and

1 transparent with plaintiffs as we can as to what we've done,  
2 where we're looking, and what the timetable is; and in the  
3 last discussion I had with plaintiffs' counsel to let them  
4 know that we've produced some of this stuff as of -- some of  
5 the documents, excuse me, as of the end of June, but there's  
6 still materials that are coming in that would be produced in  
7 the middle of July. And then we're still just having  
8 difficulty even trying to figure out where some of these  
9 materials would be and collect that. But we've undertaken  
10 to get them by the end of July. So we've not yet produced  
11 all the materials.

12 And we've also offered, once the materials are  
13 produced, to meet-and-confer with plaintiffs' counsel and go  
14 through them informally to try and address any questions or  
15 issues, because we feel as if that probably will give them  
16 more concrete or specific information, because if they have  
17 questions, we can go back and try and fill them in.

18 And then if, after this process, this has all been  
19 narrowed and there's some discrete area of testimony, then  
20 maybe we can talk about that. But we're talking about a  
21 process to avoid the very kinds of things that happen where  
22 we produce the documents, a witness who's generally familiar  
23 with them is sitting in the chair, and then the plaintiffs  
24 ask the question, and the witness is, well, I'm sorry, I  
25 can't answer that; I'd have to go to X, Y, and Z. And then

1 we're kind of back to square one again.

2 THE COURT: Well, let me ask Ethicon a question.  
3 Are you intending in the Huskey case to introduce evidence  
4 about various medical associations and societies? Is this  
5 going to be an issue that you're presenting at the trial?

6 UNIDENTIFIED SPEAKER: Judge, these societies have  
7 published statements within the last several years where  
8 they speak very favorably of the mesh. So it is anticipated  
9 that -- I mean, what these are, these are mostly like  
10 organizations of doctors, and they speak through their  
11 designated boards and that sort of thing. And we would want  
12 to reserve the right to be able to use those, because they  
13 are -- they are representative of the physician groups that  
14 use the devices throughout the country. And actually, I  
15 think some of them might be -- well, yeah, I mean they're  
16 representative of large physician groups.

17 THE COURT: Well, if you want to reserve your  
18 right to introduce that sort of evidence, then clearly the  
19 plaintiffs have a right to discover whether there's any sort  
20 of bias that may underlie the opinions and support that  
21 these associations are giving to your product. So they're  
22 going to have the right to discover that. And I don't --

23 UNIDENTIFIED SPEAKER: Actually, we agree with  
24 that.

25 THE COURT: Right. And I don't know, then, that

1 just providing them with paperwork is going to be enough.  
2 It may be that the paperwork is truly confusing or they  
3 can't -- they can't put their chronology together or they  
4 can't lay the trail; they don't understand how it works  
5 within the society and they need some sort of testimony. I  
6 don't know that necessarily the Ethicon person is the place  
7 to go. Maybe the place to go is to the society or the  
8 association and find out how it works. But what I'm saying  
9 is, you know, they may have a point that they need to get  
10 some testimony on it. It's hard for me to tell, because I  
11 haven't seen any of the paperwork, so I'm not sure how  
12 confusing these things really are.

13 I hear Mr. Aylstock saying that he's looked at some of  
14 the paperwork and he finds it to be confusing. If that's,  
15 in fact, true, then he would be entitled to have someone  
16 give him some explanation as to what it means, because I do  
17 think bias would be a legitimate avenue for them to explore.

18 UNIDENTIFIED SPEAKER: Your Honor, and just so  
19 we're clear, I think -- and I agree with that. It's not  
20 that we're trying to deny them the right to do the  
21 discovery. I think what we're trying to request is the  
22 process by which we get there. And we just think that the  
23 process would be better served for them to await the  
24 production of documents, and then, then we can try to work  
25 with them to, to offer stipulations to try to narrow the

1 issues. And then if that doesn't work or if there's some  
2 aspect that can't be narrowed, then if we have to, we put  
3 somebody up, but -- so it's not really -- we don't want --  
4 we're not trying to stop all the discovery, it's that --  
5 it's really more the process of how we get there, Judge.

6 THE COURT: Well, I think I hear them saying they  
7 don't want to do it that way and they don't have to do it  
8 that way; they have the right to select the way they want to  
9 do it. I don't necessarily agree that that's true. I think  
10 the Court does have some control over what would be the most  
11 efficient way to go about it. The concern that I have is if  
12 this is going to be an issue in the Huskey trial, I'm not  
13 sure that there's time to wait for you all to produce all of  
14 your paperwork, and then go through it, and then try to  
15 decide whether you can agree on certain stipulations, and  
16 then try to take depositions, because -- when is this trial  
17 supposed to begin?

18 UNIDENTIFIED SPEAKER: Late August.

19 UNIDENTIFIED SPEAKER: August.

20 THE COURT: Late August.

21 MR. CARTMELL: Your Honor, the way we've handled  
22 this in the past, you may recall, is they have produced  
23 documents ten days before our 30(b)(6) depositions. That  
24 gives us time to review those. And then we had worked -- in  
25 the past, you know, if there's issues that come up and we

1 get those documents and we think they're incomplete or we  
2 have questions, that gives us the kind of time that, you  
3 know, we need to go through that. And, frankly, you know,  
4 with Angelini and several others it's worked fine.

5 And so when Richard, you know, told me that, I said,  
6 look, I'm fine with having meet-confers after you give us  
7 the documents; we'll do that. And if for some reason, you  
8 know, things went crazy and we needed more time or you did,  
9 after you give us the documents, and we can maybe push the  
10 deposition back. But the problem is, I didn't want to just  
11 delay and say, no date has been set with this witness, who's  
12 a 30(b)(6) designee, and give us the documents and then  
13 later, you know, have a date.

14 I said, give us the date. We'll have the person set up  
15 for the deposition. If something comes up, maybe we move it  
16 back a few days or a week or whatever. But ten days before,  
17 give us the documents, we'll look at them, we'll chat with  
18 you. If we have issues, we'll take them up during that  
19 period of time.

20 THE COURT: I think that's the way you're going to  
21 have to do it, simply because of the timeframes. And having  
22 said that, Mr. Cartmell, I certainly don't want to hear that  
23 you went to a deposition and spent four hours asking  
24 somebody to read how much they paid a various association.  
25 I mean that would be, you know, abusive I think. If you've



1 got documents that are clear, there's no sense to go over  
2 that sort of thing when something like that could be  
3 stipulated.

4 And if it's stipulated, you can argue it; you can put  
5 it before the jury. There's no reason why you can't use it.  
6 Something like that. In fact, if anything, I think a jury  
7 would appreciate it if you would just use it and argue it,  
8 rather than make them sit there while you have somebody go  
9 through page after page after page, reading to them how much  
10 money they've received for something.

11 So -- but I do think what the plaintiffs are saying, I  
12 think that's the way it's going to have to be done because  
13 of the timeframe. I think you need to get the documents to  
14 them, but you probably need to set a date up some time,  
15 perhaps, early in August of some witness who will be  
16 prepared to go through these things.

17 And then you need to try -- the plaintiffs need to try  
18 to really skinny down the true issues that they have some  
19 confusion on, to ask this witness, so that this witness  
20 isn't trying to -- because, you know, whoever Ethicon gets  
21 is not going to know in advance, is not going to be able to  
22 know the information that you want. Because I doubt that  
23 there's anyone in the organization who is familiar with all  
24 of this information.

25 Is there anybody, Mr. Gage, or, Mr. Bernardo, who, who

1 really rode herd on all of the deals with all of the various  
2 associations, over all of these years?

3 MR. BERNARDO: No, there's not -- this is Rich  
4 Bernardo, Your Honor. No, there's not. And that's one of  
5 our difficulties. And we understand Your Honor's ruling,  
6 and we appreciate the guidance you give, because you've  
7 addressed our precise issue. As to timing, I just will say  
8 for the record that, that part of our objection is that the  
9 time crunch we're in is largely, if not completely, the  
10 plaintiffs' making by raising these things now at this stage  
11 of the discovery. Had we been back six months or a year  
12 ago, perhaps we wouldn't be here.

13 But part of our, our difficulty is that it is going to  
14 be very time-consuming for us to get a witness educated on  
15 the payments to each of these -- what the systems were used  
16 to figure that out, where they are, where there were gaps;  
17 where records might be. I mean, it's not a centralized  
18 system where you push a button and, you know, print out a  
19 spreadsheet of each of these organizations.

20 THE COURT: Right. And let me clarify, too. Let  
21 me clarify my thought process here, as well.

22 I really do not think that the plaintiffs need  
23 information that detailed. I'll tell you, for one thing, if  
24 that's -- if that's what you're trying to get, I don't know  
25 why, because that is never going to be important to anybody

1 listening to this case. I mean, I can understand wanting to  
2 know how much money Ethicon has paid various organizations  
3 over time, and what kind of a relationship Ethicon had with  
4 these organizations, and what the give and take was; whether  
5 Ethicon contributed to certain projects of these various  
6 organizations, and sort of the big picture, but I think if  
7 you're going to really dig for nitty-gritty, fine details, I  
8 cannot expect that they're going to be able to produce that  
9 to you, number one. Number two, I wouldn't -- I wouldn't be  
10 very upset with them if they couldn't. And number three, I  
11 don't think anybody is going to be prepared to testify about  
12 that. Again, I wouldn't be very upset if they couldn't get  
13 someone prepared to testify about that. And I don't think  
14 it's going to be helpful to you. It's just a waste of time.  
15 And if you bring that sort of thing into this trial, Judge  
16 Goodwin is going to kill you.

17 It's -- that is the kind of brutal -- that's the sort  
18 of brutal evidence that nobody wants to hear. They want to  
19 hear the big picture. They don't want to hear little,  
20 nitty-gritty things that nobody cares about.

21 MR. CARTMELL: Your Honor -- yeah, no, Your Honor,  
22 you're exactly right. And we get that. I mean, I will tell  
23 you that our intent is exactly as you say. You know, I was  
24 really talking about the Lewis trial previously, because Ms.  
25 Jones in her opening statement put up a slide that had all

1 the logos for these societies that we're asking about and  
2 said, look, every single one of them is supportive of mesh.

3 Our response to that, like you say, is very -- you  
4 know, it's very simple. And that is, look, here's all the  
5 money they've paid to these societies and all of the  
6 relationships they have with these societies. That's it.  
7 We're not going to dig into the nitty-gritty.

8 We do think they have that information, because a lot  
9 of it -- you know, we found out during Angelini's deposition  
10 related to payments to doctors is that the marketing people  
11 are the ones that monitor this -- these sort of payments,  
12 and there is a system that they use to, to track those.

13 So that's all we want. And we will not go into the  
14 weeds. We understand that we won't be able to do that at  
15 trial either.

16 THE COURT: All right. Well, don't do that.  
17 Don't do that. Don't do that in your notices; don't do that  
18 at the deposition. And don't expect them to have someone  
19 prepared to do that. And as I said, if, if they don't have  
20 someone prepared to do that and you come back and you  
21 complain about that, I am not going to be sympathetic.

22 MR. CARTMELL: Okay, I understand. For  
23 clarification, I will say, what happened the first time was,  
24 we got there and we said, okay, how much did you pay Doctor,  
25 Dr. -- Dr. Nilsson (phonetic) or Ulmsten. And we did get

1       there. And they said, well, we paid them a lot of money in  
2       2003 to 2010. And we entered that into evidence, and we had  
3       a little two-minute clip on that.

4               But then we found out that, you know, they hadn't even  
5       looked in certain places and they couldn't find it. I mean,  
6       I would want for us to maybe ask about those types of  
7       things, Your Honor, just -- because an answer, "We didn't  
8       look," or, "We don't know," is equally as relevant to us.  
9       But that's it as far as digging.

10              THE COURT: Right. I think the broad, the broad  
11       issues, like how much money did you pay this organization in  
12       this year, or, how much money did you pay them over this  
13       five-year period, and what did you pay them for; did you pay  
14       them to do research on pelvic mesh; did you pay them for  
15       advertising; did you pay them for -- whatever; what is your  
16       relationship with them; what committees do you serve on.  
17       Those sorts of things are legitimate questions. Some of the  
18       finer -- like going through a contract in detail is just  
19       ridiculous. And that's what I don't want to see you doing.

20              MR. CARTMELL: Okay.

21              THE COURT: I do understand what Ethicon is  
22       saying. These are the kinds of things that should have been  
23       done a year ago. And I can understand why they're peeved to  
24       have to be doing this a month before trial or two months  
25       before a trial starts. I understand that. But, you know,

1 if you're going to go to trial, Mr. Gage, and, Mr. Bernardo,  
2 and you're going to talk about these associations -- and I  
3 heard you say, if I'm not mistaken, that some of these  
4 publications are recent -- then the plaintiffs have a right  
5 to explore your relationship with the people that are  
6 publishing these articles. And that's just the way it is.

7 So let's use some common sense in this discovery is all  
8 I'm saying. I am not going to prevent them from taking a  
9 deposition if they truly need a deposition, but let's try to  
10 work through this, and remember what the goal is, which is  
11 to present a case to a jury that they can understand and  
12 appreciate, and not one that's going to put them to sleep.

13 UNIDENTIFIED SPEAKER: Okay. And, Your Honor --

14 UNIDENTIFIED SPEAKER: And, obviously, we're not  
15 going to have a lot of time for them, given Judge Goodwin's  
16 directive on how long these need to last. So we totally get  
17 that.

18 THE COURT: I'm telling you, they're getting  
19 shorter every case -- every trial, too. Every time he sits  
20 through one, I think I hear him cut a few hours off the next  
21 one. So, I'm warning you, they're going to get shorter and  
22 they're going to get shorter.

23 Now, the second issue was this particular researcher.  
24 Plaintiffs, tell me, what is the deal with the researcher.  
25 Why do you want to know what he did wrong?

1 MR. AYLSTOCK: If I could, Your Honor, this is  
2 Bryan Aylstock again. Joe Zonies is on the phone, and I  
3 wanted to introduce him to you. He's a member of our PFC,  
4 and he's been doing a lot of the TVT-O specific discovery  
5 and has a lot of knowledge about Dr. de Leval. So if I  
6 could just introduce Joe.

7 THE COURT: All right.

8 MR. ZONIES: Good morning, Judge.

9 THE COURT: Good morning.

10 MR. ZONIES: Joe Zonies here. It is a pleasure  
11 being in front of you. This is my first time.

12 Judge, this is about -- the trial coming up is about  
13 the TVT-O device, obturator approach. And Dr. de Leval is a  
14 Belgian scientist and doctor who developed the device. In  
15 2003, at the end of the -- 2003, Ethicon went in and entered  
16 into an agreement with Dr. de Leval to have exclusive --  
17 essentially exclusive rights to sell the TVT-O device. And  
18 within a year, by the end of, I think it's 2004, at -- maybe  
19 -- yeah, 2004, Ethicon rolled TVT-O out into the market.

20 And the primary focus is what happened between the time  
21 of 2003, during the development and the time that it rolled  
22 out to market, in that one-year period. And the reason that  
23 Dr. de Leval is important is because he had exclusive access  
24 to all of the trial information. He was the only scientist  
25 -- or he and his associate, Waltregny, were the only two

1 doctors who ever utilized this device before it went to  
2 market. So they were the sole owners of all of the  
3 information about the device.

4 And part of what happened is, is during the  
5 development, in the first part of 2004, Ethicon continued to  
6 ask Dr. de Leval for his data and his clinical data showing  
7 that the device was safe and effective. And he continued to  
8 not be able to provide it to them.

9 So, ultimately, Ethicon hired a company called  
10 Med-Alliance to go in and take a look at what was going on  
11 in the lab in Belgium.

12 And that scientist wrote a very long report back to  
13 Ethicon, saying, there's a problem; Dr. de Leval has  
14 essentially been experimenting on women without the proper  
15 authority to do so from the authorities, and he's been doing  
16 it without the proper consents, and he's been doing it  
17 without -- we don't have true paperwork showing that the  
18 device is safe and effective. And I believe he may have  
19 subjected himself and Ethicon potentially to criminal  
20 liability because he's taking TVT devices -- Ethicon knows  
21 he's taking these devices; he's manipulating them, changing  
22 them, putting them together, in violation of both European  
23 and U.S. regulations, and then putting them into women who  
24 don't know that he's doing an experiment on them, because  
25 they haven't consented to an experiment.



1           We have -- we've pieced together that sort of testimony  
2           and story through multiple depositions. And in those  
3           depositions, we've asked the question, what was the  
4           company's position, once it knew he had done this, what did  
5           the company do about it.

6           And the most that we've gotten is -- it was actually a  
7           document that says, in 2004, oh, my gosh, we want nothing to  
8           do with this study that this guy has done. He denied it,  
9           even though he's paid for it, and our contract says with him  
10          that we can back out of it completely. But that comes from  
11          the people in the field.

12          And we are seeking in this case, in deposition,  
13          Ethicon's position on why and what they did about the fact  
14          that Dr. de Leval had essentially violated the law in his  
15          initial clinical trials, and why Ethicon denied that it had  
16          any involvement in those clinical trials, when it did; and  
17          that, ultimately, what did Ethicon do to try to ensure the  
18          device was safe and effective before they started selling it  
19          to thousands of women, when it was the same scientist that  
20          they used before they -- the only scientist whoever used it  
21          before they started to sell it on the market.

22          And so the questions are really what is the  
23          corporation's -- what was the corporation's thinking and  
24          position on these very serious issues before it started  
25          marketing this device, when it used only the person who had

1 created the data supporting the device illegally.

2 THE COURT: Well, I don't see -- I'm not seeing  
3 how that's relevant. I really -- I'm not. Are you saying  
4 that some of the women in the MDL were experimented on by  
5 this Dr. de Leval?

6 MR. ZONIES: No, no, not at all, Your Honor. I  
7 don't mean to imply that at all.

8 THE COURT: So he didn't have anything to do -- he  
9 didn't have anything to do with any of the women in the MDL?

10 MR. ZONIES: Well, he created the device, and the  
11 only data that Ethicon had when it started marketing the  
12 device was his data. So any woman who got the device in the  
13 United States did so based upon this data that Ethicon knew  
14 was not accurate data.

15 THE COURT: Well, I didn't hear you say -- I  
16 didn't hear you say anything about the accuracy of the data.  
17 I heard you say that he didn't follow foreign laws as to how  
18 he was accumulating the data. That he was not --

19 MR. ZONIES: No.

20 THE COURT: Okay.

21 MR. ZONIES: Your Honor, I apologize. It is also  
22 the accuracy of the data. It's important to point out that  
23 the investigator that Ethicon sent over -- Ethicon hired him  
24 to go in and see what happened. He reported back that the  
25 data was incomplete, that the data was not captured

1       correctly, and that there wasn't, frankly, sufficient data  
2       that was done in a correct way. Not even -- I'm not even  
3       talking about the regulatory aspects, but literally that the  
4       data was not collected correctly. We've asked for the data  
5       itself and have not been able to get that.

6               MR. BERNARDO: Your Honor, this is Rich Bernardo.  
7       I think the record is getting very clouded by this  
8       discussion, because, back to Your Honor's point about  
9       relevance. If I may, let me just for clarity read the three  
10      subject matters at issue, because they have nothing to do  
11      with the accuracy of the data. They're purely about whether  
12      or not he violated -- and, if I may, I'll just read the  
13      three. They're very short.

14             One topic is: Any conclusion reached by defendants as  
15      to whether or to what extent conduct by Dr. Jean de Leval or  
16      Dr. David Walregny violated any Government or regulatory  
17      rules, laws, or regulations in connection with this study of  
18      any TVT product, component or prototype.

19             The next one was: Any decision reached by defendants  
20      as to whether to report violation of any applicable  
21      regulations or laws by Dr. Jean de Leval or Dr. David  
22      Waltregny to any Government regulatory authority.

23             And finally: All reports or communications made by  
24      defendants regarding violation of any rules, regulations, or  
25      laws by Dr. Jean de Leval or David Waltregny to any

1 Government or regulatory authority.

2 Those are the three subjects we're objecting to. And  
3 we're objecting to them on the grounds of relevance, for  
4 many of the reasons Your Honor's already stated.

5 THE COURT: Well, I agree. I don't think any of  
6 those things are relevant to the issues in this case. I  
7 don't see it. It sounds to me like what you're trying to do  
8 is explore how bad Ethicon is. You want to show that it's a  
9 bad company, a mean, criminal company. And so you want to  
10 explore how they had this little, evil scientist, this mad  
11 scientist there overseas doing these experiments on women.  
12 And I'm just -- I'm not going there. That's not what the  
13 case is about.

14 MR. ZONIES: Well, and -- and I understand what  
15 you're saying, Your Honor, and I appreciate that. I think  
16 what we're trying to do is, through a discovery mechanism --  
17 again, whether or not this gets admitted at trial I think is  
18 a whole separate issue -- but through a discovery mechanism,  
19 try to determine whether or not Ethicon, frankly, the  
20 corporation, knew of these things or whether or not it was,  
21 you know, perhaps, somebody in France or, you know, making  
22 decisions without the corporation knowing and understanding  
23 how this data was developed. And if the corporation itself  
24 did not understand that, I think it's something that's  
25 relevant for when the corporation then started selling the

1 devices. The corporation -- I'm sorry, go ahead.

2 THE COURT: The three topics that Mr. Bernardo  
3 just read to me are not relevant to this case. They're not  
4 relevant. And I'm not going to allow you to do discovery on  
5 those three topics. I don't think those topics have  
6 anything to do with the issues in this case.

7 MR. ZONIES: And to be -- I just want to  
8 understand the scope of that, Your Honor, and that's the  
9 extent that it's, whether or not those three topics, any  
10 conclusions reached by Ethicon about whether or not there  
11 was a violation of any rules or regulations.

12 THE COURT: I don't think whether this, this  
13 scientist violated the laws of a foreign Government is  
14 relevant to this case. And that's what these three topics  
15 really have to do with is whether Ethicon knew he was  
16 violating rules or regulations or laws, whether they wanted  
17 to report it, whether they did report it; what they did with  
18 it. I don't think any of that is relevant to this case.

19 Whether his data was accurate or not, whether they  
20 relied on his data, that would be relevant to the case. But  
21 that's not what you're asking about in these three topics.

22 And, apparently, that information you've already  
23 discovered, because you're telling me that you've gotten  
24 information from Med Alliance that none of his data was  
25 really accurate. So it sounds like you've discovered what

1 is probably the accurate portion of this particular person's  
2 information.

3 UNIDENTIFIED SPEAKER: Just for clarification,  
4 Your Honor, you mentioned that -- whether or not this  
5 scientist violated the law, but is it relevant -- I guess  
6 our position is that it would be relevant if Ethicon  
7 violated the law. In other words, if Ethicon knew of these  
8 violations and as manufacturing a medical device have a duty  
9 or responsibility to report things, or make sure that the  
10 accuracy of the data was, in fact, accurate, but they failed  
11 to do that, I guess that's where we think there's, at least,  
12 a discoverable issue.

13 THE COURT: But you're talking about the laws of a  
14 foreign government, right? I don't know how that's  
15 relevant. I don't understand how you think that's relevant  
16 to this case.

17 MR. ZONIES: Well, I may not have explained it  
18 clearly. And because what Tom said is correct, it's not  
19 really whether or not he violated the law, what it is is, by  
20 -- Ethicon knew -- it's our position that we need to  
21 demonstrate -- but Ethicon knew that he was taking TVT  
22 devices and manipulating and altering those devices and then  
23 implanting them into women. And from Ethicon's standpoint,  
24 and under the U.S. laws, potentially, that is a violation of  
25 U.S. regulations, U.S. laws, as well.

1           So the issue really is not about whether or not what  
2           Waltregny and de Leval did as much as what did Ethicon do,  
3           the company, when given this information, or did they even,  
4           frankly, know the information.

5           We have the Med Alliance report, saying that his data  
6           was inaccurate and discussing these issues about altering  
7           devices, but what we don't have is the company's position on  
8           what it did when it received that report. We only have,  
9           essentially, the report itself, and the people on the ground  
10          who got it that didn't ultimately make the decisions or have  
11          the knowledge about what to do in response to it. That's  
12          what we're looking for.

13          It's not so much about the violations themselves, but  
14          the company -- what were the actions and decisions based  
15          upon, and whether or not it knew that.

16                 MR. BERNARDO: And, Your Honor, this is Rich  
17                 Bernardo again. And I read the subject matters into the  
18                 record precisely for the reason that that's -- that is not  
19                 what the subject matters are, number one.

20                 Number two, exploring the conduct of somebody well over  
21                 a decade ago in a foreign country with respect to research  
22                 he did prior to any relationship, contractual relationship  
23                 with the company is so far astray from relevant information,  
24                 it clearly would not be admissible.

25                 I'm not even sure, Your Honor, we could figure that

1 out, because now what we're talking about is not objective,  
2 like the payments or anything like that, but it's now what  
3 is borne out by any of the documents. And we agreed to look  
4 for anything that might discuss this and provide them to  
5 plaintiffs. And to date, we've not found anything that  
6 would discuss this. So it's almost -- it's almost  
7 impossible even to address.

8 And, again, for the reasons you said, it's completely  
9 far astray from any of the issues or individuals in this  
10 case. And it's, again, trying to pin Ethicon as a bad  
11 company for not taking action on some conduct that's not  
12 even clear as to what it was. We have one person's opinion  
13 in this report.

14 THE COURT: Well, and I thought I heard you read  
15 in those topics that the questions have to do with did  
16 Ethicon report the violations. The violations would have  
17 been violations of some foreign Government's laws and  
18 regulations. So the report --

19 MR. BERNARDO: That's correct.

20 THE COURT: -- would have to be to that foreign  
21 entity. You wouldn't report -- I wouldn't report to the  
22 United States Government that somebody violated Sweden's  
23 laws, because the United States Government wouldn't care.  
24 Right? So I don't -- I'm just not seeing how this is at all  
25 relevant to this particular case.



1           What Ethicon did about the doctor who was -- where was  
2           he doing these -- where was he? What country was he?

3           UNIDENTIFIED SPEAKER: Primarily in Belgium, Your  
4           Honor.

5           THE COURT: So he's in Belgium?

6           UNIDENTIFIED SPEAKER: At the University of the  
7           Liege, yes.

8           THE COURT: So I don't -- I really cannot follow  
9           how it makes any difference what Ethicon did about what they  
10          were told regarding what this scientist did in Belgium.

11          MR. GAGE: Your Honor, this is William Gage. I  
12          would note, when this issue -- this issue was addressed in  
13          the Batiste case back in March, in Texas state court, and  
14          our Motion in Limine to exclude any reference to this issue  
15          was granted.

16          THE COURT: Well, I can understand why. I think  
17          that it is a very inflammatory issue that really doesn't  
18          have anything to do with the merits of the case. I think  
19          there may be some issues in there that are meritorious, like  
20          did Ethicon use data that was inaccurate. I think that's a  
21          very fair area to explore.

22          I don't think it's fair to explore whether Ethicon  
23          reported to Belgium that a scientist, perhaps, didn't follow  
24          the rules in Belgium. And if they didn't, that makes them  
25          look like they're a bad company, with a crazy scientist

1       doing experiments on his own. I think that is -- is just  
2       beyond the pale as far as kind of a character assassination  
3       tactic that I don't think is fair in a trial. It's just  
4       not.

5               And I'm not going to let you at this point run down  
6       that road and do that kind of discovery. I mean it's -- I  
7       don't think it's relevant. So, no, I'm not going to allow  
8       you to do that. And I'm not going to make Ethicon put up a  
9       person to testify about that.

10              UNIDENTIFIED SPEAKER: Okay, that's understood,  
11       Your Honor. There are multiple other topics on that. I  
12       think those are the three that are at issue. But we have  
13       your ruling and we will definitely abide by it.

14              THE COURT: Now, while I have you on the phone,  
15       let's talk about Dr. Gretchen -- is it Byrkit? Is that how  
16       you pronounce--

17              UNIDENTIFIED SPEAKER: You know, this may not be  
18       -- we may not be the right people to talk about this. But  
19       is Dr. Byrkit -- she's a treating physician in the Huskey  
20       case?

21              THE COURT: Yes.

22              UNIDENTIFIED SPEAKER: Okay. I got to tell you, I  
23       probably know more than anybody on this phone from  
24       plaintiffs' perspective about it, but I know very little  
25       about it.

1           THE COURT: All right. Well, there's been a  
2 motion for a protective order filed on it, and I realize  
3 plaintiffs have not had an opportunity to respond yet, but  
4 it has to do with her deposition that's been scheduled on  
5 July 21st. And, as you know, I'm getting ready to leave. I  
6 will be out beginning on the 11th of July. So something has  
7 to be done on this before I go. And what strikes me about  
8 this is it appears to me that I have already ruled on this  
9 issue once before. It also appears to me that this issue  
10 has -- is dealt with in the deposition protocol. And so I'm  
11 somewhat confused as to why this issue has arisen.

12           What it is is that the plaintiffs, apparently, are --  
13 have subpoenaed Dr. Byrkit to give a second deposition on  
14 the same subject matter. They want to do it as an  
15 evidentiary deposition for trial. And she does not want to  
16 give a second deposition.

17           Ethicon doesn't want to go to a second deposition.  
18 They've made a motion for protective order, and they've  
19 argued that, of course, the deposition protocol doesn't  
20 allow for a second deposition, number one.

21           Number two, we'd previously discussed the fact that  
22 there's nothing in the protocol that really allows for  
23 evidentiary depositions. And previously I had not allowed  
24 an evidentiary deposition, because, I mean, honestly, I  
25 don't think that that was something that the parties agreed

1 to do. And I don't think it can logically or practically be  
2 done in these cases. It just can't be done.

3 And so, unless there's some good cause reason for  
4 taking a second deposition, which I haven't heard yet -- and  
5 maybe that's what the plaintiffs are going to put in their  
6 response to this -- I'm not, I'm not going to allow a second  
7 deposition of this physician. But this issue needs to be  
8 resolved pretty quickly. I think --

9 UNIDENTIFIED SPEAKER: Okay, I --

10 THE COURT: I think Laura sent out an E-mail  
11 yesterday asking for when we could do a telephone conference  
12 on this. And I was hoping that I might have you people on  
13 the phone today, and we could just resolve it today, but it  
14 doesn't sound like I have the right people on the phone --

15 UNIDENTIFIED SPEAKER: Yeah --

16 THE COURT: -- I'm kind of telling you what I'm  
17 thinking. Go ahead, I'm sorry.

18 UNIDENTIFIED SPEAKER: Yeah. I'm sorry. I  
19 interrupted you three times straight. But, I will pass that  
20 on. And Ed Wallace, I think, is primarily responsible for  
21 that issue. I do know, actually, and Andy just told me that  
22 the argument is that there's new documents or new  
23 information since the last depo. But I will pass on what  
24 you have said, and, you know, obviously with -- they're  
25 going to need to do something right away. And tell them --

1 would you like me to tell them that, in lieu of a written  
2 response, if they're willing to, that you would get back on  
3 the phone quick and decide it that way, if necessary?

4 THE COURT: Yes.

5 UNIDENTIFIED SPEAKER: Or would you rather them  
6 file?

7 THE COURT: No. You know, they don't really need  
8 to do a written response. What I would be looking for from  
9 them is what is required under the protocol, and that is, a  
10 good cause reason for doing a second deposition. In her  
11 case, she doesn't want to do a second deposition, which will  
12 weigh against a second deposition. It says in the motion  
13 for protective order that there are no new documents; there  
14 has been no activity since her deposition was given a year  
15 ago. It was a six-hour deposition. Everything was  
16 apparently covered.

17 You know, I sympathize with all of you. I think it's  
18 terrible that you have to present your whole case through  
19 these long, unwieldy depositions, and I hate that for you,  
20 but that's the way, unfortunately, it is. And I don't -- I  
21 really don't see any way around that.

22 I don't think that -- I don't think there's any fair  
23 way to allow an evidentiary deposition here and one here,  
24 but not here. And I don't think it's manageable, with the  
25 number of trials that we're going to start having in these

1 MDLs, I just don't think it's manageable to be taking  
2 evidentiary depositions.

3 So, good cause to me is not that you'd rather have a  
4 better deposition for trial. Good cause is going to have to  
5 be something more than that. So if you would pass that  
6 along; tell them they don't need to do a written response.  
7 We can just get back on the phone and we can talk it out.  
8 But my inclination is not to allow someone to do an  
9 evidentiary deposition simply because they want a better  
10 deposition to use at trial.

11 UNIDENTIFIED SPEAKER: Okay. I'll pass that on  
12 today. And somebody will get back to you today.

13 THE COURT: I would appreciate that. Thank you.

14 UNIDENTIFIED SPEAKER: We do have three other  
15 notices, Your Honor, just like Rich said, we've kind of been  
16 working through those. You know, there may be some things  
17 we can't agree on, like this. But I think we'll get back to  
18 you on those right away, too, because you're leaving town.  
19 One of them we've agreed we'll push till after the Huskey  
20 trial -- at least one, maybe two -- two of them?

21 Yeah, two of them. Two of the three we've agreed we'd  
22 push until after the Huskey trial, although we are still  
23 reserving our right to get the discovery. One of them deals  
24 with payments to foreign authors.

25 We did the payments to Nilsson (phonetic) and Ulmsten.

1 That one deals with foreign authors that we're going to take  
2 up later.

3 So, we're trying to limit the amount of time and  
4 issues, the number of issues that we'd bring to you, and  
5 hopefully there won't be too many more.

6 THE COURT: Well, let me ask you while I have you  
7 on the phone, do you think you need an order, or do you feel  
8 that you can go from here without me generating an order on  
9 what we've talked about today?

10 UNIDENTIFIED SPEAKER: I think that we can go  
11 without an order from the plaintiffs' perspective.

12 UNIDENTIFIED SPEAKER: Your Honor, as I understand  
13 it, this hearing's been transcribed, and assuming that's  
14 correct, we'll just order a copy of the transcript and let  
15 that kind of serve as Your Honor's order, if that's okay  
16 with you?

17 THE COURT: That is music to my ears, actually.  
18 You are all my favorite people today.

19 Yes, it has been recorded. So, yes, you can request  
20 the transcript and then you'll have it all. So I appreciate  
21 that. Thank you.

22 UNIDENTIFIED SPEAKER: Well, thank you, Your  
23 Honor.

24 UNIDENTIFIED SPEAKER: Judge, we appreciate your  
25 time.

1 UNIDENTIFIED SPEAKER: Thanks.

2 THE COURT: All right, thank you. Bye-bye.

3 (Proceedings concluded.)

4

5 REPORTER'S CERTIFICATE

6 I, Catherine L. Schutte-Stant, Official Court  
7 Reporter of the United States District Court, for the  
8 Southern District of West Virginia, do hereby certify that  
9 the foregoing proceedings, which were taken out of my  
10 presence, were transcribed by me from an audio recording to  
11 the best of my ability, and said proceedings are a true and  
12 accurate transcript from my stenographic notes. I further  
13 certify that I am neither related to any of the parties by  
14 blood or marriage, nor do I have any interest in the outcome  
15 of the above matter.

16 JULY 3, 2014

17 s/CATHERINE L. SCHUTTE-STANT, RPR, RMR  
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